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Supreme Court, U.S.
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In The
Supreme Court of the United States

CHAD COPELAND,
Petitioner,

v.

STATE OF OHIO,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court of Ohio

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PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED FOR REVIEW

1. Whether judicially severing the Ohio statutes, that imposed presumptive minimum and concurrent sentences, that were in effect at the time of the offense conduct and conviction, due to the unconstitutional, per *Blakely vs. Washington,* statutory ability of a trial judge to depart from minimum or concurrent sentences, thereby retroactively imposing a longer and harsher sentence based on a system that did not exist at the time of the offenses or the convictions, violates due process and freedom from *ex post facto* laws prohibited by the United States Constitution.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

CHAD P. COPELAND
Petitioner,

v.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS, TWELFTH APPELLATE DISTRICT

Petitioner Chad P. Copeland respectfully requests this Court to issue a Writ of Certiorari to review the judgment of the Ohio Court of Appeals, Twelfth Appellate District, Butler County, Ohio, in *State v. Copeland,* 2007-Ohio-6168, Case No. CA2007-02-039 (November 19, 2007), *discretionary review denied, State v. Copeland,* Case No. 2008-

0003, 117 Ohio St. 3d 1460, 2008-Ohio-1635, 884 N.E.2d 68 (April 9, 2008), *motion for reconsideration overruled, State v. Copeland,* Case No. 2008-0003, 118 Ohio St. 3d 1436, 2008-Ohio-2595, 887 N.E.2d 1204 (June 4, 2008).

OPINIONS BELOW

The Opinion and Judgment of the Ohio Court of Appeals, Twelfth Appellate District, Butler County, Ohio, in *State v. Copeland,* 2007-Ohio-6168, Case No. CA2007-02-039 (November 19, 2007), *discretionary review denied, State v. Copeland,* Case No. 2008-0003, 117 Ohio St. 3d 1460, 2008-Ohio-1635, 884 N.E.2d 68 (April 9, 2008), *motion for reconsideration overruled, State v. Copeland,* Case No. 2008-0003, 118 Ohio St. 3d 1436, 2008-Ohio-2595, 887 N.E.2d 1204 (June 4, 2008), is unreported and is reproduced in the Appendix to this petition at D1. The Ohio Supreme Court's order denying Petitioner's request for discretionary review is reported at 117 Ohio St. 3d 1460, 2008-Ohio-1635, 884 N.E.2d 68 (April 9, 2008) and is reproduced in the Appendix to this petition at B1. The Ohio Supreme Court's order denying Petitioner's Motion for Reconsideration is

reported at 118 Ohio St. 3d 1436, 2008-Ohio-2595, 887 N.E.2d 1204 (June 4, 2008) and is reproduced in the Appendix to this petition at A1.

JURISDICTION

The Ohio Court of Appeals, Twelfth Appellate District, Butler County, Ohio, rendered its Opinion and Judgment November 19, 2007. Pet. App. D1. The Ohio Supreme Court denied the timely filed petition for discretionary review on April 9, 2008. Pet. App. B1. Petitioner's timely motion for reconsideration was denied on June 4, 2008. Pet. App. A1. Petitioner now timely files this Petition for Writ of Certiorari to the Ohio Court of Appeals, Twelfth Appellate District. This Court's jurisdiction is invoked under Title 28 U.S.C. §1257(A).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person . . . shall be deprived of life, liberty, or property, without due process of law[.]" The Sixth Amendment states in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ." The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Article I, Section 10 of the United States Constitution provides in relevant part: "No State shall ... pass any ... ex post facto Law[.]"

The relevant provisions of the Ohio criminal statutes underlying Petitioner's case are lengthy and are therefore reproduced in the Appendix beginning at K1 through R1.

STATEMENT OF THE CASE

This Petitioner was indicted in a 23 count Indictment in the Butler County, Ohio, Common Pleas Court. Counts 15-23 of the Indictment related to the accusation of passing eight bad checks and one aggregate count of theft for all of them. Counts 1-14 related to a subsequent sale of stock in a private closely held corporation. Petitioner was tried and convicted by jury on all 23 counts in September 2003. The convictions ranged from fourth-degree to first-degree felonies.

The matter came for sentencing on November 20, 2003. The Court was advised without dispute that Petitioner had no prior felony convictions and no prior prison sentences. T.p 11/20/03, p. 23, 36. Nothing was presented otherwise. At that time Ohio Revised Code §2929.14(B) mandated the trial court impose the shortest term authorized by Statute unless the trial judge found certain facts, and a trial judge could not impose more than a minimum sentence on a defendant like this Petitioner without making certain statutory findings on the record at the sentencing hearing. *State v. Comer*, 99 Ohio St.3d 463, 469, 793 N.E.2d 473 (2003). Nor could a trial

judge impose *any* prison term for a fourth or fifth degree felony without other factual findings. Ohio Revised Code §2929.19(B)(2)(a). The same limits upon judicial discretion also constrained a trial judge's ability to impose consecutive sentences. Ohio Revised Code §2929.14(E)(4). A trial court had to make all the statutorily enumerated findings and the supporting reasons for those findings to explain why an enhanced sentence was necessary to serve the purposes and intent of Ohio's sentencing scheme. *State v. Comer,* 99 Ohio St.3d at 468, 793 N.E.2d at 477. The legislature specifically designed those sentencing reforms to reserve consecutive sentences "for the worst offenses and offenders." *Id.*

As a result, the maximum prison term this Petitioner could have received was 3 years, the minimum sentence for the most serious offense. Nonetheless, Petitioner was sentenced to multiple consecutive prison sentences, all more than the minimum sentence provided by Statute, and in fact for each Count just one month or year short of the *maximum* for each offense of conviction (but for those that were merged for sentencing) due to the trial court reciting the specified factual findings. The total aggregate sentence was 23 years. The

aggregate sentence was more than what the maximum could have been imposed for even the most serious of all offenses of conviction. The sentence included consecutive sentences for each of Counts 3, 4, 5 and 15 (the longest of the concurrent sets). Judgment, Dec. 9, 2003, T.d. 284, p. 4.

An appeal was timely filed to the Ohio Court of Appeals, Twelfth Appellate District, for Butler County, Ohio, which ruled partially in the Petitioner's favor, as to the merger of two other sentenced counts. That Court agreed that Count 1 and Count 2 should also have been merged. *State v. Copeland*, No. CA2003-12-320, 2005-Ohio-5899 (But. App., Nov. 7, 2005), ¶ 86 (*Copeland I*).

Petitioner filed for discretionary review by the Ohio Supreme Court, which was granted on the basis that the sentence was void pursuant to *State v. Foster*, 104 Ohio St.3d 1438, 819 N.E.2d 1122 (2004), which, after Petitioner's sentencing but while his case was on direct appeal, found certain of Ohio's sentencing statutes unconstitutional on the basis of precedent from the United States Supreme Court, including *Apprendi v. New Jersey* and *Blakely v. Washington*. The Ohio Supreme Court in *Foster* described the question presented as "whether Ohio's felony sentencing structure

violates the Sixth Amendment to the United States Constitution in the manner set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington* 542 U.S. 296 (2004)." *State v. Foster*, 109 Ohio St. 3d at 3, 845 N.E. 2d at 477. On February 27, 2006, the Ohio Supreme Court found those selected provisions of the relevant sentencing statutes (Ohio Revised Code §§ 2929.14, 2929.19 and 2929.41, reproduced in the Appendix at N, O, and Q, respectively), unconstitutional. *State v. Foster*, 109 Ohio St.3d at 1, syllabus paragraphs 1, 3 and 5, and 3; 845 N.E. 2d at 475, 477. To remedy the constitutional violations, the Ohio Supreme Court severed those portions of the statutes declared unconstitutional, including the provisions for judicial fact-finding to enhance sentences, but *also* the statutes mandating minimum, concurrent sentences without such fact finding. *Id.* at syllabus paragraphs 2, 4 and 6. The Court then ordered Mr. Foster's case remanded to the trial court for a new sentencing hearing. Numerous other cases, including this Petitioner's, were summarily remanded to the Trial Courts for a new sentencing hearing on that basis. Pursuant to Ohio precedent, the resentencing was *de novo*.

Petitioner immediately raised the constitutional infirmities of the severance remedy. The new sentencing for Petitioner Copeland was January 18, 2007. The Petitioner argued he should have received no more than the minimum sentence on each count, concurrent to each other, as was the statutory law when his offenses of conviction were committed. The trial judge disagreed and imposed the same original sentence, 23 years, which for each count was more than the minimum allowed by statutes in effect at the time of the offense. The new sentence also repeated the consecutive sentences.

A second appeal was timely filed. In that second appeal Petitioner raised as error all of the relevant issues including the unconstitutionality of retroactive application of the *Foster* remedy. The Ohio Court of Appeals, Twelfth Appellate District, overruled all those assignments of error and issues presented for review. *State v. Copeland*, 2007-Ohio-6168, ¶ 23-26, Case No. CA2007-02-039 (November 19, 2007) (*Copeland II*), Pet. App. D1. A timely appeal was filed to the Ohio Supreme Court by way of petitioning for discretionary review on the same issues. The Ohio Supreme Court denied the petition for discretionary review,

April 9, 2008, reported at 117 Ohio St. 3d 1460, 2008-Ohio-1635, 884 N.E.2d 68 (April 9, 2008) and reproduced in the Appendix to this Petition at B1. Petitioner further timely moved the Ohio Supreme Court for reconsideration, which was also denied, June 4, 2008, and is reported at 118 Ohio St. 3d 1436, 2008-Ohio-2595, 887 N.E.2d 1204 (June 4, 2008) and is reproduced in the Appendix to this petition at A1.

HOW THE FEDERAL ISSUES WERE RAISED AND DECIDED BELOW

On February 27, 2006, the Ohio Supreme Court found selected provisions of the relevant Ohio sentencing statutes were contrary to *Blakely v. Washington* and violated the Sixth and Fourteenth Amendments to the United States Constitution. *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 475, syllabus ¶¶ 1, 3 and 5. To remedy the constitutional violations, the Ohio Supreme Court severed those portions of the statutes declared unconstitutional. *Id.* at syllabus ¶¶ 2, 4 and 6. This Petitioner's case, still pending on direct review at the time and raising the same issues, was subsequently ordered remanded to the trial court

for a new sentencing hearing. *In re Ohio Criminal Sentencing Statutes Cases*, 110 Ohio St.3d 264, 2006-Ohio-4475, ¶ 3.

Petitioner raised the constitutional infirmities of the severance remedy immediately thereafter. The new sentencing for Petitioner Copeland was January 18, 2007. The Petitioner argued he should have received no more than the minimum sentence on each count, concurrent to each other, as was the statutory law when his offenses of conviction were committed:

> THE PROSECUTOR: We're here today for purposes of resentencing Chad Copeland pursuant to order of the Supreme Court of Ohio.
>
> THE COURT: This is in accordance with *Foster*, which is a series -- which is a case that caused a series of cases now in Ohio to be resentenced following a decision finding that parts of the Ohio Sentencing Code were unconstitutional.
>
> [DEFENSE COUNSEL]: That is where we are. I would at this time would reserve any and all factors relevant to Mr. Copeland's sentencing as found in the *Foster* case for further review, of course, depending on the sentencing. But any of the *Foster* arguments

that would apply to Mr. Copeland I am reserving for appeal.

THE COURT: Fair enough.

[DEFENSE COUNSEL]: The minimum sentences for first time offenders, concurrent sentencing for first time offenders, any and all other arguments that would apply to Mr. Copeland's case.

T.p. 1/18/2007, p. 3, Pet. App. F1. Nonetheless, the Trial Court disagreed and imposed the same original sentence, including for each count more than the minimum allowed by the statutes in effect at the time of the offense, and many consecutive to each other. Amended Judgment, Jan. 24, 2007, T.d. 320; T.p. 1/18/2007, p. 39.

A second appeal was timely filed. In that second appeal, Petitioner raised as error all of the following relevant issues as Assignments of Error and Issues Presented for Review:

SECOND ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED IN ITS SENTENCING OF THE APPELLANT TO MULTIPLE, CONSECUTIVE, AND MORE-THAN-MINIMUM SENTENCES

First Issue Presented for Review: A prison sentence for a first-time felony of more than the minimum sentence, consecutive sentences, and a total of 23 years in prison, for one securities transaction and passing bad checks, is an abuse of discretion and is contrary to law

Second Issue Presented for Review: A trial court errs in sentencing a defendant who is a first time felon, for conduct which occurred prior to the remedy fashioned in State *v. Foster*, more than the statutorily prescribed minimum sentence

Third Issue Presented for Review: The Constitutional Rule of lenity prohibits a choice among equal statutory interpretations resulting in increased penalties for a criminal defendant.

And citing to the United States Constitution and numerous United States Supreme Court precedents that striking the application of Statutes

in effect when an offense is committed and convicted, that mandated a minimum statutory sentence without judicial-fact finding, and retroactively applying a different sentencing scheme that resulted in a much higher sentence, was a violation of the Petitioner's Federal Constitutional rights, including expressly to due process of law, and of the Constitutional "Rule of Lenity." Appellant's Brief, State v. Copeland, filed May 29, 2007, p. i - v, and p. 5-19 (reproduced in Pet. App. E1).

The Ohio Court of Appeals, Twelfth Appellate District, overruled all those assignments and issues on the merits, based on other cases it had already decided on the same points. *State v. Copeland,* 2007-Ohio-6168, ¶ 23-26, Case No. CA2007-02-039 (November 19, 2007), Pet. App. D1. A timely appeal was filed to the Ohio Supreme Court by way of petitioning for discretionary review. The Petitioner again presented the following relevant propositions of law:

> Proposition of Law III: A criminal defendant who is a first time felon, for conduct which occurred prior to the remedy fashioned in *State v. Foster*, cannot be sentenced to more

than the statutorily prescribed minimum sentence.

Proposition of Law IV: The Constitutional Rule of Lenity prohibits a choice among equal statutory interpretations resulting in increased penalties for a criminal defendant.

And again citing to numerous precedents from this Court raising the same federal Constitutional issues. Appellant's Memorandum in Support of Jurisdiction, State v. Copeland, No. 2008-0003, filed January 2, 2008, p. i, 6-11, reproduced in Pet. App. C1. The Ohio Supreme Court denied the petition for discretionary review, April 9, 2008, reported at 117 Ohio St. 3d 1460, 2008-Ohio-1635, 884 N.E.2d 68 (April 9, 2008) and reproduced in the Appendix to this Petition at B1. Petitioner further moved the Ohio Supreme Court for reconsideration, which was also denied, June 4, 2008, and is reported at 118 Ohio St. 3d 1436, 2008-Ohio-2595, 887 N.E.2d 1204 (June 4, 2008) and is reproduced in the Appendix to this petition at A1.

While agreeing that the Ohio sentencing scheme violated the Sixth Amendment, Petitioner argued the Ohio Supreme Court's crafted remedy

increased the punishment that could be imposed at the new sentencing hearing, in violation of the Due Process Clause and the Ex Post Facto Clause of the United States Constitution. Applying the judicially-crafted sentencing scheme retroactively to him and the hundreds of similarly situated defendants whose offenses predated the *Foster* decision at a new sentencing proceeding would deny them due process. The Ohio Supreme Court denied Petitioner's appeals without comment.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

SUMMARY

Prior to 1996, Ohio followed an indeterminate sentencing regime. However, the 1995 Criminal Sentencing Act, 146 Ohio Laws, Part IV, 7136 (Senate Bill 2) was enacted to reform the sentencing laws and provide "truth-in-sentencing." The revised statutes included statutory presumptions limiting the sentence a trial court could impose absent certain findings. Prior to *State v. Foster*, Ohio Revised Code §2929.14(B) mandated the trial court impose the shortest term authorized unless the court found those certain facts and a

trial judge *could not* impose more than a minimum sentence on a first offender without making the statutory findings on the record at the sentencing hearing. *State v. Comer*, 99 Ohio St.3d 463, 469, 793 N.E.2d 473 (2003). Nor could a trial judge impose *any* prison term for a fourth or fifth degree without factual findings. O.R.C. §2929.19(B)(2)(a). The same limits upon judicial discretion also constrained a trial court's ability to impose consecutive sentences. O.R.C. §2929.14(E)(4) (prison sentences "shall" be served concurrently to each other, unless consecutive sentences are imposed and permitted by the requisite findings of fact).

A trial court had to make all the statutorily enumerated findings and the supporting reasons for those findings to explain why an enhanced sentence was necessary to serve the purposes and intent of Ohio's sentencing scheme. *State v. Comer*, 99 Ohio St.3d at 468, 793 N.E.2d at 477. Moreover, the legislature designed these sentencing reforms to reserve consecutive sentences "for the worst offenses and offenders." *Id.* In fact, more than a minimum concurrent sentence in any other circumstance was a sentence "contrary to law," *State v. Maynard*, 132 Ohio App.3d 820 (1999),

State v. Sheppard, 124 Ohio App.3d 66, 67-68 (1997), and therefore appealable as of right. O.R.C. §2953.08(A)(4). These statutory presumptions -- the *statutory* minimum and concurrent -- were the prescribed statutory *maximum* penalty that could be imposed, absent a jury finding additional elements beyond a reasonable doubt, exactly as described in *Apprendi v. New Jersey* and *Blakely v. Washington*, and conceded by the Ohio Supreme Court.

The Ohio Supreme Court, following *Blakely v. Washington*, 542 U.S. 296 (2004), held in *State v. Foster* that the part of Ohio's sentencing scheme allowing judicial fact finding to enhance a sentence past the statutory minimum or to impose consecutive sentences was unconstitutional. The Ohio Supreme Court then severed those provisions, but in the process of fashioning a remedy also removed those statutory provisions that mandated minimum, concurrent prison terms, if there were not those additional fact-findings. Ohio defendants with *Blakely* claims pending were to be re-sentenced pursuant to the *judicially revised* statutes. Because the Ohio Supreme Court severed the legislatively enacted elements required to be found prior to imposing a sentence beyond the

minimum term, or to impose a consecutive sentence, Ohio judges were then for the first time after the enactment of the Ohio Sentencing Reform Act unfettered discretion to impose any sentence within the statutory ranges, which is contrary to the legislatively enacted sentencing statutes. In this way the *Foster* judicial remedy violates the Due Process Clause and the Ex Post Facto clause, by retroactively increasing the potential punishment of convicted defendants, beyond and above what it could have been under the Statutes existing at the time of the offenses, due to a judicially created remedy.

The irony is that this "remedy" allows Ohio to effect the very result that *Foster* declared was an unconstitutional violation of *Blakely v. Washington*: the trial court has "full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d at 30, 845 N.E.2d at 498. As a result of *Foster*, judicially reviewable findings are only necessary when a trial judge *gives less than* the presumed sentence for first and second degree felonies. *State v. Mathis*, 109 Ohio St.3d 54, 846

N.E.2d 1 (2006), syllabus, ¶1. Indeed, the Ohio Criminal Sentencing Commission wrote in its March 28, 2006 memorandum that "*Foster* eliminates guidance from the statutes designed to assure adequate prison space for the worse [sic] offenders and to make sentences more consistent statewide." March 28, 2006 Memorandum from the Ohio Criminal Sentencing Commission to Judges and Other Interested Parties re: Felony Sentencing after *Foster*, pg. 4.[1]

This Court has also found that eliminating appellate review was a second reason to find that a defendant had been "substantially disadvantaged" by the retrospective application of the revised guidelines to his crime. *Miller v. Florida*, 482 U.S. 423, 433 (1987). Here, as in *Miller*, severance presents another disadvantage by virtue of its application to Petitioner by eliminating judicial fact-finding that attended sentences exceeding the presumptive sentence and the presumptive sentences contained within the severed statutes: *Foster* effectively forecloses appellate review.

The retroactive application of the judicially amended sentencing statutes changes the

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[1]See http://sentencing.typepad.com/sentencing_law_and_policy/files/ocsc_on_foster.doc.

punishment Petitioner may suffer and compromises his ability to appeal his sentence. Accordingly, the severance remedy as applied to Petitioner will violate his right to due process. The Ohio Supreme Court's misapplication of a severance remedy resulted in the judicial creation of a state sentencing scheme that contradicts the Ohio sentencing scheme enacted by Ohio General Assembly in 1995. Accordingly, the application of the judicially-created sentencing scheme denies Petitioner and hundreds of other Ohioans due process of law.

I. The Ohio Supreme Court's remedy of re-sentencing Petitioner and hundreds of other Ohio defendants whose offenses occurred prior to the judicially-created sentencing scheme imposed by *State v. Foster* is unconstitutional because it effectively raises the presumptive sentences for first-time offenders and those convicted of fourth and fifth degree felonies and eliminates effective appellate review. As a result, the Ohio Supreme Court's remedy violates the Ex Post Facto and Due Process Clauses of the United States Constitution.

In *State v. Foster*, the Ohio Supreme Court held that because Ohio's sentencing statutes

"require judicial fact-finding before imposition of a sentence greater than the maximum term authorized by a jury verdict or admission of the defendant, they are unconstitutional." *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 475, syllabus ¶1, citing to *Apprendi v. New Jersey* and *Blakely v. Washington, supra*. To remedy the constitutional infirmity, the Ohio Supreme Court severed the provisions that imposed judicial fact-finding prerequisites, but also eliminated the presumptive minimum and concurrent sentences. *State v. Foster*, 109 Ohio St. 3d at 1, 845 N.E.2d at 475-76, syllabus ¶¶2, 4, and 6. As a result, contrary to the legislatively enacted sentencing scheme, a judge could impose a sentence beyond the statutory "maximum" (which was the minimum, concurrent term if, as here, the defendant is a first offender), without a jury finding the additional elements beyond a reasonable doubt.

The Ohio Supreme Court's Opinion in *State v. Foster* unequivocally finds: 1) the Ohio statutory scheme -- as it existed when this Petitioner committed the offenses he was convicted of -- mandated a minimum and concurrent sentence *unless* additional fact-finding was made justifying a higher sentence; and 2) under Federal

constitutional law, it was unconstitutional for a judge, rather than a jury, to make those fact-findings, or to make them by any standard less than beyond a reasonable doubt, following *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). See also, *Cunningham v. California*, 549 U.S. 270 (2007). Although the proper remedy was a new sentencing hearing, *Foster, supra* at ¶103,[2] and that part of the Opinion is not in reasonable dispute, it is also what (other than the remedy fashioned) would mandate,

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[2] The State in this case previously suggested that the Statutes were rewritten to take out only the fact-finding provisions, and leave in the rest, but selectively rewrites the Statute only to also take out *policy considerations* -- a "rewriting" process the Ohio Supreme Court declined to do. *State v. Foster, supra* at 30, ¶102. The General Assembly's pronouncement of what policy considerations sentences should be based on, independent of individual fact-finding to enhance a stated sentence, is not unconstitutional fact-finding. Preserving such considerations is not unlike the Federal Sentencing laws considered in *United States v. Booker*, and applied to various State laws in *Apprendi* and *Blakely*. See *Cunningham v. California, supra* at 867-868, nn. 12, 13.

by statute, that this Petitioner receive only the minimum and concurrent sentence.

The Ohio Supreme Court though went further, and then struck the portion of the Statutes that mandated a minimum concurrent sentence without additional findings of fact. No where does the *Foster* Opinion mention the constitutional implications of retroactively striking a statute, resulting in a longer penalty to a criminal defendant whose offense was committed when the more favorable statute was in effect, and the Ohio Supreme Court has to date refused to address that issue. That is the issue still to be addressed: whether under any circumstances it could be lawful for this Petitioner to be sentenced to anything more than the minimum, concurrent sentence, when the statutes in effect at the time of his offense mandated that sentence. When the United States Supreme Court struck down Blakely's enhanced sentence that was based on unconstitutional fact-finding, the State of Washington was not free to just judicially eliminate its system of guidelines and retroactively apply a new discretionary scheme in order to resentence Blakely to his original term of imprisonment. The only sentence that could be rendered on remand was the sentence that the law

required at the time without consideration of the unconstitutional judicial fact-finding. *Blakely*, 542 U.S. at 313. Prior to *Foster* the Sixth and Fourteenth Amendments prohibited the State from imposing any sentence other than the statutory minimum. *Foster, supra* at ¶56-67. Prior to *Foster*, R.C. §2929.14(B) provided that a court shall impose *the shortest prison term authorized for the offense* in the absence of additional, judicial fact-finding. *Constitutional* law as it existed at the time of his offenses mandated a minimum term. *Foster, supra* at ¶56-67.

A. The *Foster* remedy acts as an Ex Post Facto law.

Article I, § 10 of the United States Constitution prohibit the enactment of any *ex post facto* law. The *ex post facto* clause prohibits a legislature for example from retroactively increasing the penalty for a crime that has already been committed. *Stogner v. California*, 539 U.S. 607, 612 (2003). Although the *ex post facto* clause "does not of its own force apply to the Judicial Branch of government," the United States Supreme Court has recognized "that limitations on *ex post facto* judicial decision making are inherent in the

notion of due process." *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). Retroactive judicial severance of a statute places the accused in exactly the same circumstances that he would be in if the legislature enacted an unlawful *ex post facto* law. Because a judicial severance changes the actual terms of the statute, the *ex post facto* clause applies. See *Miller v. Florida*, 482 U.S. 423 (1987) (this Court struck down state sentencing guidelines because they violated the *ex post facto* clause, because at the time the defendant committed the crime sentencing guidelines resulted in a presumptive sentence of 3½ to 4½ years of imprisonment); *Carmell v. Texas*, 529 U.S. 513, 533 (2000) (reaffirming that a state's retroactive modification of its laws regarding evidence -- in this case the evidence necessary to impose more than a minimum sentence -- could constitute a viable *ex post facto* challenge). As recognized in *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964), "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids."

The United States Supreme Court has been extremely vigilant in searching for any *retroactive*

increase in a defendant's sentence and quick to strike down those increases. In *In re Medley*, 134 U.S. 160 (1890), the Court examined a statute that was not in effect at the time of the offense that mandated that the petitioner had to be held in solitary confinement while awaiting execution. The prior statute had no such provision and therefore "was an additional punishment of the most important and painful character and is therefore forbidden by this provision [Ex. Post Facto Clause] of the Constitution of the United States." *Id.* at 171. In *Lindsey v. Washington*, 301 U.S. 397 (1937), this Court addressed a change in the State of Washington's sentencing provisions from the law in effect at the time of the offense, which provided that the trial court could impose a sentence up to a maximum of fifteen years, to at the time of sentencing which required a sentence of fifteen years in every case, but with parole discretion to determine whether a shorter sentence was appropriate. The Court prohibited the application of the new law to that petitioner, holding that the *ex post facto* clause looks to the *standard of punishment* prescribed by the statute rather than the sentence actually imposed. *Lindsey*, 301 U.S. at 401.

In *Miller v. Florida*, 482 U.S. 423 (1987), this Court struck down state sentencing guidelines for violating the *ex post facto* clause, because at the time the defendant committed the crime the sentencing guidelines resulted in a presumptive sentence of 3½ to 4½ years of imprisonment, and the sentencing judge had discretion to sentence an offender anywhere within the presumptive range without the requirement of a written explanation, but a departure outside of the range required clear and convincing reasons in writing for doing so; but by the time of the sentencing hearing, the presumptive sentence was higher. The United States Supreme Court unanimously reversed a result nearly identical to this Petitioner's situation, but which the Ohio Supreme Court refuses to address, and no lower Ohio court will overrule. It was immaterial that the defendant could not definitively show he would have received a lesser sentence under the old guidelines because petitioner has been "substantially disadvantaged" by the retroactive application of *revised* guidelines, which *allowed* the judge to impose a higher sentence than previously contemplated. *Id.* at 431-33. As the Court stated:

To impose a 7-year sentence under the old guidelines, the sentencing judge would have to depart from the presumptive sentence range of 3½ to 4½ years. As a result, the sentencing judge would have to provide clear and convincing reasons in writing for the departure, on facts proved beyond a reasonable doubt, and his determination would be reviewable on appeal. By contrast, because a 7-year sentence is within the presumptive range under the revised law, the trial judge did not have to provide any reasons, convincing or otherwise, for imposing the sentence, and his decision was unreviewable. Thus, even if the revised guidelines law did not "technically . . . increase . . . the punishment annexed to [petitioner's] crime," *Lindsey, supra,* at 401, it foreclosed his ability to challenge the imposition of a sentence longer than his presumptive sentence under the old law. Petitioner therefore was "substantially disadvantaged" by the retrospective application of the revised guidelines to his crime.

Miller, supra at 432-433.

This Court in *Carmell v. Texas*, 529 U.S. 513 (2000), reaffirmed that a state's retroactive modification of its laws regarding evidence -- in this Petitioner's case the evidence necessary to impose more than a minimum sentence -- could constitute a viable *ex post facto* challenge:

> All of these legislative changes, in a sense, are mere images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.

Id. at 533 (Thomas, J.). Similarly, once the United States Supreme Court (and the Ohio Supreme Court, for that matter) determined that it is unconstitutional to impose more than the minimum sentence on a criminal defendant because of the availability of a higher sentence only

after additional fact finding, it is also unconstitutional to retroactively apply the striking of the statutory presumptions that mandate that minimum sentence. In this case, that retroactive change results in an increase from *a maximum of three years* in prison (the statutory minimum and therefore the legal maximum under the Ohio presumptive sentence*) to the result of unfettered discretion -- 23 years in prison, a difference of 20 years.*

Judicial severance that expands the available range of punishment falls within the proscriptions of the *ex post facto* clause and in addition exceeds the limits on retroactive judicial decisions under the Fourteenth Amendment. As recognized in *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964), "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, 10, of the Constitution forbids." Given the similar impact of judicial decision-making and legislation on the rights of criminal defendants, the fundamental principle that "the required criminal law must have existed when the conduct in issue occurred" *must be applied* to restrict the retroactive application of

both. *Id.* at 354. The Court explained: "If a state legislature is barred by the *Ex post facto* Clause from passing [a retroactive law], it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353. A law is retrospective if it "changes the legal consequences of acts completed before its effective date." *Miller v. Florida*, 482 U.S. at 431, citing *Weaver v. Graham*, 450 U.S. 24, 31 (1981). The Court observed that it is "axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law." *Id.* (internal citation omitted).

B. The Ohio Supreme Court's remedy was unforeseeable and indefensible in light of the law expressed prior to *Foster*.

Due process demands that a defendant have fair warning of what constitutes a crime. *Bouie v. Columbia*, 378 U.S. at 350. Fair warning is denied, however, when there is an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face. *Id.* at 352. Consequently, this Court determined that if a judicial construction of a criminal statute is "'unexpected and indefensible by reference to the

law which had been expressed prior to the conduct in issue,' [the construction] must not be given retroactive effect." *Id.* at 354 (citation omitted).

When this Petitioner went to trial in the Butler County Common Pleas Court, he could not have foreseen that Ohio would judicially sever the portions of Senate Bill 2 that replaced a trial court's mandate to impose minimum, concurrent sentences unless facts were found otherwise as provided by statute, a "guided discretion," with unfettered, unreviewable discretion. *State v. Foster*, 109 Ohio St. 3d at 27, 845 N.E.2d at 495-496. Even after *Blakely*, Ohio defendants could not have foreseen this judicially-created severance remedy, as the Ohio Supreme Court itself had advised prior to *Foster* that if the sentencing statutes were ultimately found to be unconstitutional, a trial court "should apply the pertinent sentencing statutes *without any enhancement provisions found to be unconstitutional*[.]" *State ex rel. Mason v. Griffin*, 104 Ohio St.3d 279, 282, 819 N.E.2d 644, 648 (2004) (emphasis added).

This Court has emphasized that petitioners lacked fair warning of the new interpretation afforded the statute as it was "clearly at variance

with the statutory language" and it did not have "the slightest support in prior [State] decisions." *Bouie v. Columbia*, 378 U.S. at 356. Subsequent courts have held that the due process clause likewise proscribes judicially enforced changes in statutory interpretations unforeseeably expand punishment beyond that which one could have anticipated at the time of committing the crime. See *Devine v. New Mexico Dept of Corrections*, 866 F.2d 339, 344-45 (10th Cir. 1989).

Retroactive application of the judicially created *Foster* remedy seriously and unexpectedly disadvantages criminal defendants. First and foremost, they are divested of the presumption of minimum and concurrent terms of imprisonment when facing their sentencing judges at the trial court -- after already pleading or going to trial on that expectation. Second, they lose the meaningful appellate rights that existed prior to *Foster* for review of non-minimum or consecutive sentences. Before the *Foster* remedy, a defendant enjoyed a presumptive sentence no more than the statutory minimum, and concurrent, and, if he received a sentence greater than the presumption, he could be assured a new sentencing hearing if the trial court failed to make the necessary findings, made

erroneous findings or failed to provide reasons for those findings made in support of maximum or consecutive terms. "Pre-*Foster*, R.C. §2953.08(G)(1) provided an opportunity for remand to the trial court if required findings were missing." *State v. Mathis*, 2006-Ohio-855, ¶¶ 34, 37.

If the *Foster* remedy is retroactively applied to resentencings these important rights will unexpectedly be lost. For the reasons expressed in *Miller*, the *ex post facto* clause would prohibit the Ohio General Assembly from eliminating the statutory presumptions in Ohio's felony sentencing law and applying that change retroactively. As in *Miller*, Ohio defendants had the expectation of presumptive sentences that could only be overcome by judicial findings, and of appellate rights that would ensure that any enhanced sentence rested squarely on a permissible basis. The elimination of any presumptive sentence and the corresponding diminished ability to challenge on appeal a departure from that presumptive sentence substantially disadvantages criminal defendants.

In the instant case the remedy accomplishes by judicial fiat that which the Ohio General Assembly is precluded from doing by the *ex post facto* clause. As explained in *Bouie*, the Due

Process Clause does not countenance such a result. For defendants whose criminal conduct pre-dates February 27, 2006, the severance remedy is unavailable as a matter of constitutional law. The decision to abolish sentencing presumptions for criminal defendants constitutes a marked and unpredictable departure from the law passed by the General Assembly. See, *Foster*, at ¶87 (explaining that "[t]he General Assembly undoubtedly never anticipated that the judicial-finding requirements contained within S.B. 2 would be held unconstitutional"). How could a criminal defendant anticipate such a change? Given this unexpected and detrimental departure, due process precludes the retroactive application of the now-severed provisions to defendants whose offense conduct pre-dates the release of the opinion in the instant case.

C. If allowed to stand, the Ohio Supreme Court's *Foster* severance remedy violates the due process clause.

The decision in *Foster* did not merely constitute judicial interpretation of the meaning of a statute; the sentencing statutes themselves were altered and enlarged through judicial severance.

The decision in *Foster* violates the Fourteenth Amendment because if "a state legislature is barred by the *ex post facto* clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie*, 378 U.S. at 353-54. If the General Assembly had repealed the statutory maximums which were in place prior to the decision in *Foster* -- which is essentially what *Foster* did -- the *ex post facto* clause would have prohibited the State of Ohio from imposing the increased penalties on this Petitioner, who had already committed the offense, had been convicted and was sentenced. *Stogner*, *Calder*, *supra*. The Fourteenth Amendment accordingly prohibits a court from achieving the exact same result through an act of judicial severance. *Bouie*, 378 U.S. at 353-45; accord *Rogers*, 532 U.S. at 460-61.

This Court struck down the Florida law that retroactively altered the presumptive sentencing range for particular offenses, even though the law allowed upward departures if the judge made specific findings -- exactly the remedy imposed by *Foster* -- citing "the lack of fair notice and governmental restraint when the legislature

increases punishment beyond what was prescribed when the crime was consummated." *Miller, supra* at 430-431, citing *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). As in *Miller*, this Petitioner had the expectation of a presumptive sentence that could only be overcome by jury findings or admission, and appellate review of any enhanced sentence. The elimination of any presumptive sentence, and the ability to appeal a departure from that presumptive sentence, substantially disadvantages him. Accordingly, the *Foster* remedy can not be retroactively applied to this Petitioner.

The Ohio Supreme Court instead severed the statutory presumptions themselves from the statute and held that on remand judges would be free to impose *any* sentence, regardless of whether or not the penalty imposed at resentencing exceeded that which would have been compelled by *Blakely*. That part of the *Foster* Decision does not address, and is incompatible with the controlling precedent of the United States Supreme Court. The Sixth Amendment not only prohibits the legislature from removing predicate factual findings from the jury, but also forbids *the judiciary* from circumventing the limitations that the legislature has placed on the availability of

criminal punishments that correspond to varying degrees of criminal culpability. *Apprendi*, 530 U.S. at 483-85. Any other rule would permit the States to "manipulate their way out of *Winship*" merely by claiming that a criminal offense is actually nothing more than a sentencing enhancement attached to a less-serious conviction. *Jones v. United States*, 526 U.S. 227, 243 (1999). Other States have come to a similar conclusion. See *Long v. State*, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996) (imposing a previously unavailable penalty through the judicial severance of the statutory maximum authorized violates the Constitution by retroactively extending the conduct to which a penalty can attach).

The United States Supreme Court has stated that it was not for the courts to rewrite the stricken sentencing Statutes, but for the legislatures. *Cunningham v. California, supra* at 868, 871. In fashioning the remedy it did, the Ohio Supreme Court also relied at least in part or at least considered the California Supreme Court's position on the issue expressed in *People v. Black*, 113 P.3d 534 (Cal. 2005). *State v. Foster, supra* at 25, n.92. The United States Supreme Court soundly rejected that case and its reasoning. *Cunningham v. California, supra* at 868-871. The argument

repeatedly relied upon to defeat *ex post facto* implications (a criminal defendant could not have expected a guaranteed minimum sentence) was also rejected, at least as a basis for preserving the unconstitutional sentencing scheme. *Cunningham v. California, supra* at 869.

D. The Ohio Supreme Court's severance remedy deprives Petitioner of a liberty interest without due process of law.

Subjecting Petitioner to a new sentencing hearing devoid of the protections originally enacted by the Ohio legislature creates a constitutional violation that was soundly condemned in *Hicks v. Oklahoma,* 447 U.S. 343 (1980). Oklahoma had determined that its habitual offender statute was constitutionally infirm while Hicks's case was pending on appeal. The Oklahoma Court of Criminal Appeals acknowledged the unconstitutionality of the state sentencing law, but affirmed the sentence because it was within the range of punishment that "could have been imposed in any event." *Hicks v. Oklahoma,* 447 U.S. at 344. Certiorari was granted to determine if Hicks was deprived of due process of law as guaranteed by the Fourteenth Amendment.

This Court described the liberty interest and constitutional dilemma caused by the subsequent affirmance of the original sentence absent the procedural safeguards that attended the original sentencing scheme:

> It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender

> provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

Hicks v. Oklahoma, 447 U.S. at 346. (Footnotes and internal citations omitted).

This Court rejected the State's claim that Hicks did not have an absolute right to a sentence imposed by a jury, noting that Hicks had a statutory right to a have a jury decide his punishment, a right that substantially affects the sentence ultimately imposed. *Id.* at 347. The right to a jury was "determinative, at least as a practical matter, of the maximum sentence that a defendant will receive." *Id.* By affirming the sentence imposed by a jury under the invalid mandatory statute, Oklahoma denied Hicks his liberty without due process of law. *Id.*

Foster excised the various statutes that set out the procedures permitting a sentencing court to impose a sentence beyond a minimum concurrent one. The Ohio law was declared unconstitutional because it did not mandate that elements needed to impose a sentence over the statutory minimum be found by a jury beyond a reasonable doubt. By eliminating on remand the statutory elements

necessary to impose a sentence other than minimum and concurrent, Petitioner was denied a substantial liberty interest that the "Fourteenth Amendment preserves against arbitrary deprivation by the State." *Hicks v. Oklahoma,* 447 U.S. at 346.

Petitioner's federal due process claim and liberty interest arise from the sentencing elements and procedures set out in Ohio Revised Code §2929.14(B), (C), and (E), 2929.19(B)(2), 2929.41(A), and his appellate rights set out in Ohio Revised Code §2953.08. Petitioner retains an overriding liberty interest in these procedures; they cannot be eliminated to his detriment, especially when to do so will substantially affect the punishment imposed.

Pursuant to the Ohio Supreme Court's remand, the trial court may now impose any sentence within the ranges provided in Ohio Revised Code §2929.14(A), but without using the statutorily prescribed procedures. *State v. Foster,* 109 Ohio St.3d at 30, 845 N.E.2d at 498. Yet Petitioner has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by statute and only in accordance with due process of law. He also has

a substantial liberty interest in the appellate procedures devised by the state legislature to insure compliance with the statutory scheme. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). These are liberty interests the Fourteenth Amendment preserves and protects from arbitrary State deprivation. Accordingly, any sentencing proceeding without these protections in place will deprive Petitioner of his liberty without due process of law.

E. The Constitutional Rule of Lenity prohibits a choice among equal statutory interpretations resulting in increased penalties for a criminal defendant.

Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not the courts should define criminal activity, *United States v. Bass*, 404 U.S. 336 (1971), and set the punishments therefor. See, *Bifulco v. United States*, 447 U.S. 381 (1980). The due process Rule of Lenity means that a court will not interpret a criminal statute so as to *increase* the penalty that it places on an individual when such an interpretation can be based on no

more than a guess of what the legislature intended. *Albernaz v. United States*, 450 U.S. 333 (1981). The enactment of the statutory provisions struck down in the Ohio sentencing cases strongly suggests that the General Assembly did not intend for judges to impose consecutive or maximum sentences in all cases. A presupposition of our law is to resolve doubts in enforcement of a penal code against the imposition of harsher punishment. *Bell v. United States*, 349 U.S. 81, 83 (1955). Ohio has codified this presupposition in R.C. §2901.04(A) that "Sections of the Revised Code defining . . . penalties shall be strictly construed against the state, and liberally construed in favor of the accused." See *State v. Quisenberry*, 69 Ohio St.3d 556, 557 (1994).

The attempt to constitutionalize Ohio's sentencing statutes by excising all clauses that restrict the trial court's discretion to impose higher sentences is also contrary to the Rule of Lenity in interpretation. The enabling statute, R.C. §181.24, clearly intended for the statutes enacted to provide uniformity and proportionality, "with increased penalties for offenses based upon the seriousness of the offense and the criminal history of the offender," and with judicial discretion to be limited.

R.C. §181.24(B)(1)-(3). Those goals were embodied in the statutes ultimately enacted and subsequently reviewed by the Court in *Foster*. The expressly stated purposes and intent of Senate Bill 2 was to reserve higher sentences for the worst offenses and offenders. *State v. Comer,* 99 Ohio St. 3d 463, 2003 Ohio 4165, at ¶21. "Consistency and proportionality are hallmarks of the new sentencing law." *Id.*, citing Griffin & Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan (2002), 53 Case W.Res.L.Rev. 1, 12. While higher sentences were permitted, imposition of such sentences required that "findings and reasons must be articulated by the trial court so an appellate court can conduct a meaningful review of the sentencing decision." Griffin & Katz, Ohio Felony Sentencing Law, at 458-459, Section 1.21.

The Ohio General Assembly's articulated goals are now relegated to historical and statutory notes, replaced by a judicially enacted scheme that requires findings only when a trial court seeks to give a "downward departure" pursuant to R.C. §2929.20(H). *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, syl. 1. Given the Court's prior pronouncements on the laudable goals inherent in

Senate Bill 2, this construction violates R.C. §2901.04(A) by imposing the *least lenient* construction of the Statute on a defendant being resentenced. In this case, that retroactive change results in an increase from *a maximum of three years* in prison (the statutory minimum and therefore the legal maximum under the Ohio presumptive sentence*) to the result of unfettered discretion -- 23 years in prison, a difference of 20 years.*

This case should be accepted to establish and clarify that rule as it applies to a judicially created remedy resulting in mass resentencings across the State. See *United States v. Santos*, --- U.S. ---, No. 06-1005 (U.S. Sup. Ct. June 2, 2008) ("rule of lenity" applied to narrowly construe statutory terms).

CONCLUSION

The petition for a writ of certiorari to the Ohio Court of Appeals should be issued. The Ohio Supreme Court's judicially-created severance remedy was crafted with no regard for Petitioner's and other Ohioan's due process rights. This Petitioner will suffer because the Ohio Supreme Court eliminated substantial benefits inherent in

the sentencing structure under which he was charged and convicted. The injuries he will suffer are not ambiguous, attenuated or insubstantial. They go to the heart of the Due Process Clause. In this case, the retroactive change created by the Ohio Supreme Court, and which it to date has refused to address on the merits, results in an increase from *a maximum of three years* in prison (the statutory minimum and therefore the legal maximum under the Ohio presumptive sentence and *Apprendi* and *Blakely) to the result of unfettered discretion -- 23 years in prison, a difference of 20 years*. Only this Court can protect Ohioan's rights in that regard, and in every other State considering a judicial remedy for the denial of the rights afforded by this Court in *Blakely*.

This Court should accept this case for full review, to clarify for Ohio and all other States the constitutional limits on judicially created re-sentencing schemes, as it did to establish nationally the rights of criminal defendants being sentenced in the first place. This case presents the next obvious logical step following *Blakely*.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF OHIO FILINGS:

Order Denying Motion for Reconsideration, filed 06/04/08 ..... A1 - A1

Order Denying Discretionary Review, filed 04/09/08 ..... B1 - B1

Excerpt Appellant's Memorandum in Support of Jurisdiction, filed 01/02/08 (pp. i, 6-11) ..... C1 - C15

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Excerpt of Appellant's Brief, filed 05/29/07 (pp. i-v, 5-19) ..... E1 - E35

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THE SUPREME COURT OF OHIO

State of Ohio — Case No. 2008-0003

v. — RECONSIDERATION ENTRY

Chad P. Copeland — Butler County

It is order by the Court that the motion for reconsideration in this case is denied.

(Butler County Court of Appeals; No. CA200702039)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

State of Ohio — Case No. 2008-0003

v. — ENTRY

Chad P. Copeland — Butler County

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

(Butler County Court of Appeals; No. CA200702039)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff/Appellee,

-vs-

CHAD COPELAND,
Defendant/Appellant.

SUPREME CT. CASE NO. 08-0003

On Appeal from the Twelfth District
Court of Appeals, Butler County Ohio

Court of Appeals
Case No. CA-2007-02-039

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CHAD P. COPELAND

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further addressing defendant, violation of right of allocution). Merely asking questions of the defendant, as the trial court did here, is not compliance. Defiance v. Cannon (1990), 70 Ohio App.3d 821; State v. Baker (1960), 113 Ohio App. 59 (merely asking, "Do you have anything to say," not compliance with the right of allocution).

"Trial judges before sentencing should ... unambiguously address themselves to the defendant .... [J]udges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing." Green v. United States (1961), 365 U.S. 301, 305, quoted in State v. Green, supra at 359. In this case, that ambiguity remains. This case does not present a "painstaking" adherence to this mandatory procedure and important right, State v. Green, supra at 359-360, and the process at least gives the appearance of a rush to an inevitable result, and not a truly deliberative process. Therefore the right was violated. Only this Court can protect that right and prevent precedent from being used to deny it further.

Proposition of Law No. III: A criminal defendant who is a first time felon, for conduct which occurred prior to the remedy fashioned in State v.

Foster, cannot be sentenced to more than the statutorily prescribed minimum sentence.

Counsel is aware that this Court has been presented this issue in other contexts and cases, but it is a developing and meritorious issue meriting final resolution by this Court; and for the following reasons. The Supreme Court did not expressly address the constitutionality of the retroactive application of the Foster remedy, and this Court simply remanded the case(s) for consideration of the Opinion. That Opinion unequivocally finds: 1) the Ohio statutory scheme -- as it existed when this Appellant committed the offenses he was convicted of -- mandated a minimum and concurrent sentence UNLESS additional fact-finding was made justifying a higher sentence; and 2) under Federal constitutional law, it was unconstitutional for a Judge, rather than a jury, to make those fact-findings, or to make them by any standard less than beyond a reasonable doubt, following United States v. Booker (2005), 543 U.S. 220; Blakely v. Washington (2004), 542 U.S. 296; Apprendi v. New Jersey (2000), 530 U.S. 466. State v. Foster (2006), 109 Ohio St.3d 1, 2006-Ohio-856. See also, Cunningham v. California (2007), --- U.S. ---, 127 S.Ct. 856. The proper remedy was a new sentencing

hearing. Foster, supra at ¶103.[1] This part of the Opinion is not in reasonable dispute, and is what (other than the remedy fashioned) would mandate, by statute, that this Appellant receive only the minimum and concurrent sentence.

This Court though went further, and then struck the portion of the statute that mandated the minimum sentence without additional findings of fact. No where does the Opinion mention the constitutional implications of retroactively striking a statute, resulting in a longer penalty to a criminal defendant whose offense was committed when the more favorable statute was in effect. That is the issue

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[1] The State suggested that the Statutes were rewritten to take out only the fact-finding provisions, and leave in the rest, but selectively rewrites the Statute to also take out the policy considerations -- a "rewriting" process this Court declined to do. State v. Foster, supra at 30, ¶102. The General Assembly's pronouncement of what policies and general considerations sentences should be based on, independent of individual fact-finding to enhance a stated sentence, is not unconstitutional fact-finding. Preserving such considerations is not unlike the Federal Sentencing laws considered in United States v. Booker, and applied to various State laws in Apprendi and Blakely. See Cunningham v. California, supra at 867-868, nn. 12, 13.

still to be addressed: whether under any circumstances it could be lawful for this Appellant to be sentenced to anything more than the minimum, concurrent sentence, when the statutes in effect at the time of his offense mandated that sentence. When the United States Supreme Court struck down Blakely's enhanced sentence that was based on unconstitutional fact-finding, the State of Washington was not free to just eliminate its system of guidelines and retroactively apply a new discretionary scheme in order to resentence Blakely to his original term of imprisonment. The only sentence that could be rendered on remand was the sentence that the law required at the time without consideration of the unconstitutional judicial fact-finding. Blakely, 542 U.S. at 313. Prior to Foster the Sixth and Fourteenth Amendments prohibited the State from imposing any sentence other than the statutory minimum. Foster, supra at ¶56-67. Prior to Foster, R.C. §2929.14(B) provided that a court shall impose *the shortest prison term authorized for the offense* in the absence of additional, judicial fact-finding. *Constitutional* law as it existed at the time of his offenses mandated a minimum term. Foster, supra at ¶56-67.

Although Foster held that the Sixth Amendment would not *require* the imposition of minimum and non-consecutive sentences on remand, Foster, supra at ¶93-102, this is not the same thing as saying that other provisions in the State or Federal Constitutions would not *prohibit* anything else. The Court instead severed the statutory presumptions themselves from the statute and held that on remand judges would be free to impose *any* sentence, regardless of whether or not the penalty imposed at resentencing exceeded that which would have been compelled by Blakely. That part of the Decision does not address, and is incompatible with the controlling precedent of the United States Supreme Court. The Sixth Amendment not only prohibits the legislature from removing predicate factual findings from the jury, but also forbids *the judiciary* from circumventing the limitations that the legislature has placed on the availability of criminal punishments that correspond to varying degrees of criminal culpability. Apprendi, 530 U.S. at 483-85. Any other rule would permit the States to "manipulate their way out of Winship" merely by claiming that a criminal offense is actually nothing more than a sentencing enhancement attached to a less-serious conviction. Jones v. United States (1999),

526 U.S. 227, 243. See also, Long v. State (Tex. Crim. App. 1996), 931 S.W.2d 285, 295 (imposing a previously unavailable penalty through the judicial severance of the statutory maximum authorized violates the Constitution by retroactively extending the conduct to which a penalty can attach). The United States Supreme Court has stated that it was not for the courts to rewrite the stricken sentencing Statutes, but for the legislatures. Cunningham v. California, supra at 868, 871. In fashioning the remedy it did, the Ohio Supreme Court also relied at least in part or at least considered the California Supreme Court's position on the issue expressed in People v. Black (Cal. 2005), 113 P.3d 534. State v. Foster, supra at 25, n.92. The United States Supreme Court soundly rejected that case and its reasoning. Cunningham v. California, supra at 868-871. The argument repeatedly relied upon to defeat *ex post facto* implications (a criminal defendant could not have expected a guaranteed minimum sentence) was also rejected, at least as a basis for preserving the unconstitutional sentencing scheme. Cunningham v. California, supra at 869.

Article II, § 28 of the Ohio Constitution and Article I, § 10 of the United States Constitution prohibit the enactment of any *ex post facto* law. The

ex post facto clause prohibits the Ohio General Assembly from retroactively increasing the penalty for a crime that has already been committed. Stogner v. California (2003), 539 U.S. 607, 612. Although the *ex post facto* clause "does not of its own force apply to the Judicial Branch of government," the United States Supreme Court has recognized "that limitations on *ex post facto* judicial decision making are inherent in the notion of due process." Rogers v. Tennessee (2001), 532 U.S. 451, 456. Retroactive judicial severance of a statute places the accused in exactly the same circumstances that he would be in if the legislature enacted an unlawful *ex post facto* law. See State v . Waddell (N.C. 1973), 194 S.E.2d 19, 29-30, abrogated on other grounds, Woodson v. North Carolina (1976), 428 U.S. 280; see also State v. Watkins (N.C. 1973), 196 S.E.2d 750, 755. Because a judicial severance changes the actual terms of the statute, the *ex post facto* clause applies. See Miller v. Florida (1987), 482 U.S. 423 (the Court struck down state sentencing guidelines because they violated the *ex post facto* clause, because at the time the defendant committed the crime sentencing guidelines resulted in a presumptive sentence of 3 1/2 to 4 1/2 years of imprisonment); Carmell v. Texas, 529 U.S. 513, 533 (2000) (reaffirming that a state's retroactive

modification of its laws regarding evidence -- in this case the evidence necessary to impose more than a minimum sentence -- could constitute a viable *ex post facto* challenge). As recognized in Bouie v. City of Columbia, (1964), 378 U.S. 347, 353, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids."

It is understood that the same issue is already before the Court in State v. Elmore, 07-475, filed March 16,2007 (an appeal from a capital case, and therefore of right). This case should be accepted for resolution of the same issue.

Proposition of Law No. IV: The Constitutional Rule of Lenity prohibits a choice among equal statutory interpretations resulting in increased penalties for a criminal defendant.

Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not the courts should define criminal activity, United States v. Bass (1971), 404 U.S. 336 (1971), and set the punishments therefor. See, Bifulco v. United States (1980), 447 U.S. 381. The rule of lenity means that the Court will

not interpret a criminal statute so as to *increase* the penalty that it places on an individual when such an interpretation can be based on no more than a guess of what the legislature intended. Albernaz v. United States (1981), 450 U.S. 333. The enactment of the statutory provisions struck down in the Ohio sentencing cases strongly suggests that the General Assembly did not intend for judges to impose consecutive or maximum sentences in all cases. A presupposition of our law is to resolve doubts in enforcement of a penal code against the imposition of harsher punishment. Bell v. United States (1955), 349 U.S. 81, 83 (1955). Ohio has codified this presupposition in R.c. §2901.04(A) that "Sections of the Revised Code defining ... penalties shall be strictly construed against the state, and liberally construed in favor of the accused."See State v. Quisenberry (1994),69 Ohio St.3d 556, 557.

The General Assembly's articulated goals are now relegated to historical and statutory notes, replaced by a judicially enacted scheme that requires findings only when a trial court seeks to give a "downward departure" pursuant to R.C. §2929.20(H). State v. Mathis, 109 Ohio St.3d 54, 2006-0hio-855, syl. 1. Given the Court's prior pronouncements on the laudable goals inherent in Senate Bill 2, this

construction violates R.C. §2901.04(A) by imposing the least lenient construction of the statute on a defendant being resentenced. This case should be accepted to establish and clarify that rule.

Proposition of Law No. V: A trial court does not have the authority to impose consecutive sentences after State v. Foster struck down the statute allowing consecutive sentences.

The legislature's function is to create the law. Courts may only impose a sentence upon a criminal defendant that is authorized by the sentencing statutes. State v. Smith (1989), 42 Ohio St.3d 60, 61; State v. West (1993), 66 Ohio St.3d 508, 513, 1993-Ohio-201. Ohio Revised Code Section 2929.14 (E)(4) authorized a trial court to impose consecutive sentences *when certain findings were made*, and R.C. §2929.41 set forth the presumption that prison terms be served concurrently. But the Ohio Supreme Court severed R.C. §2929.14(E)(4) and R.C. §2929.41 because the judicial fact-finding requirements included in those provisions were unconstitutional. Foster at ¶99. When the Court severed the unconstitutional provisions of R.C. §2929.14 and R.C. §2929.41, it also severed constitutional sentencing law -- *i.e.*, the statutory authority to impose consecutive prison terms. Courts may only impose a

sentence upon a criminal defendant that is authorized by the sentencing *statutes*, which the judiciary cannot write. See State ex rel. Mason v. Griffin (2004), 104 Ohio St.3d 279, 2004-Ohio-6384 (lack of statutory authority for jury-sentencing trials prohibits conduct of such trials); State v. Smith (1989), 42 Ohio St.3d 60, 61; State v. West (1993), 66 Ohio St.3d 508, 513, 1993-Ohio-201. This Court severed and

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,
Plaintiff-Appellee,

- vs - CASE NO. CA2007-02-039

JUDGMENT ENTRY

CHAD P. COPELAND,
Defendant-Appellant.

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

/s/ H.J. Bressier
H.J. Bressier, Presiding Judge

/s/ James E. Walsh
James E. Walsh, Judge

/s/ Stephen W. Powell
Stephen W. Powell, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,
Plaintiff-Appellee,

- vs - CASE NO. CA2007-02-039

OPINION
11/19/07

CHAD P. COPELAND,
Defendant-Appellant.

CRIMINAL APPEAL FROM BUTLER COUNTY
COURT OF COMMON PLEAS
Case No. CR02-10-1658

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POWELL, J.

{¶1} Defendant-appellant, Chad P. Copeland, appeals his sentence from the Butler County Court of

Common Pleas. We affirm the decision of the trial court.

{¶2} Appellant was convicted of 21 criminal counts[1] for his involvement in a check-kiting scheme and a theft from an investment scheme. Appellant was sentenced to 23 years in prison and ordered to pay $216,500 in fines and $868,381.68 in restitution. Appellant appealed his conviction and sentence to this court in *State v. Copeland*, Butler App. No. CA2003-12-320, 2005-Ohio-5899 ("*Copeland I*"). In that case, this court affirmed appellant's convictions, but reversed and remanded the case to the trial court, ordering that a count of aggravated theft and a count of grand theft be merged because they were allied offenses of similar import. Thereafter, the Ohio Supreme Court accepted appellant's discretionary appeal and reversed the judgment of this court for resentencing based on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. See *In re Ohio Criminal Sentencing*

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[1]Appellant was convicted of two counts of aggravated theft by deception, one count of grand theft by deception, on count of money laundering, nine counts of misrepresentation in the sale of securities, and eight counts of passing bad checks. *Copeland I* at ¶11.

Statutes Cases, 110 Ohio St.3d 264, 2006-Ohio-4475. On remand, the trial court sentenced appellant once again to a total of 23 years in prison and ordered him to pay $216,500 in fines and $868,381.68 in restitution. Appellant timely appeals, raising two assignments of error.

{¶3} Assignment of Error No.1:

{¶4} "THE TRIAL COURT ERRED IN DENYING THE APPELLANT THE RIGHT OF ALLOCUTION."

{¶5} In his first assignment of error, appellant argues the trial court denied appellant his right to allocution by "interrupting" and "terminating" his allocution.

{¶6} We first note that the failure of a trial court to ask a defendant whether he has an thing to say before sentence is imposed is not a constitutional error. *Hill v. United States* (1962), 368 U.S. 424, 428, 82 S.Ct. 468. Although not considered a constitutional right, the right of allocution is firmly rooted in the common-law tradition. *Green v. United States* (1961), 36 U.S. 301, 304, 81 S.Ct. 653.

{¶7} Crim.R. 32(A) states, "At the time of imposing sentence, the court shall do all of the following:

{¶8} "(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a

statement in his or her own behalf or present any information in mitigation of punishment.

{¶9} "(2) Afford the prosecuting attorney an opportunity to speak;

{¶10} "(3) Afford the victim the rights provided by law;

{¶11} "(4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate."

{¶12} "The plain language of the rule imposes a mandatory duty upon the trial court to unambiguously address the defendant and provide him or her with the opportunity to speak before sentencing." *State v. Green*, 90 Ohio St.3d 352, 358, 2000-Ohio-182, citing *Green v. United States* (1961), 365 U.S. 301, 305, 81 S.Ct. 653, 655. "A Crim.R. 32 inquiry is much more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse." *Green* at 359-360. If the trial court fails to offer a defendant the right to allocute, the remedy is a remand for resentencing. *Hamilton v. Brown* (1981), 1 Ohio App.3d 165, 168.

{¶13} "Although the right of allocution is absolute, it is not unlimited." *State v. Hofmann*, Erie App. No. E-03-057, 2004-Ohio-6655, ¶32, citing *State v. Smith* (Nov. 8, 1995), Greene App. No. 94-CA-86, 1995 WL

655943 at *2. Crim.R. 32(A)(1) prescribes that it be a statement or presentation in "mitigation of punishment." Id. at ¶33. "The purpose of allocution is to allow the defendant an additional opportunity to state any further information which the judge may take into consideration when determining the sentence to be imposed." *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 828.

{¶14} At the resentencing hearing in this case, after affording appellant's trial counsel an opportunity to speak, the trial court gave appellant the opportunity to speak in mitigation. Appellant began his allocution by stating that he has worked in the prison law library since his original conviction and conducted "a lot of research." Appellant then addressed the trial judge, inquiring "are you a man of your word." The trial judge responded, "I am willing to listen to your mitigation. I am not going to be cross-examined." Appellant continued to address the trial judge about this question, but the judge redirected appellant to confine his remarks to mitigation. The trial judge instructed appellant, "You can say whatever you want. I am not going to play whatever game that you attempted to orchestrate here * * * so if you want to offer some mitigation, Mr. Copeland, I suggest you proceed."

{¶15} Thereafter, appellant ended his inquiry with the trial judge and continued with his allocution. Appellant discussed his view of this court's holding in *Copeland I*, and claimed that cases against him were improperly joined for trial. Appellant argued that he was wrongly convicted of the check-kiting scheme. Appellant then discussed his interactions with the investors that led to his theft and securities-related convictions, arguing that he did nothing fraudulent. Thereafter, appellant stated that he had "67 people on my witness list that could have testified" and that he did not testify at trial. Appellant criticized the prosecutor and stated, "The main thing though, that I wanted to see happen today is I want the justice of this case to be based on the truth. And nothing that happened in this courtroom was based in truth." Appellant then began discussing the stock market and how the investments he made have gone up in value since his incarceration. Further, appellant began discussing his civil suite to recover his investment funds.[2]

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[2] Appellant's statement of allocution totaled twelve transcript pages.

{¶16} At that point, the trial judge asked appellant if he would be "available" to pay restitution and appellant responded that he has always intended to repay a promissory note that he had given to the victims. Finally, the trial judge stated, "I understand the mitigation that you are going to offer this Court is that you were - the Court lost its way and made an improper ruling that allowed the cases to be tried simultaneously. In other words, it didn't sever the cases. And that you were not guilty to these offenses and the jury lost its way by finding you guilty"

{¶17} Appellant responded, "Yes."

{¶18} Appellant argues that the trial court denied his right to allocution by interrupting and terminating the allocution. We disagree.

{¶19} The case at bar is similar to the situation in *State v. Hofmann*, Erie App. No. E-03-057, 2004-Ohio-6655. In *Hofmann*, the Sixth District found "that Hofmann was permitted to give a lengthy statement that covered a number of topics, including his regret for the pain caused to his family, his medical problems and depression, his service in the community, and how the victim started asking him questions about sex. After Hofmann accused the Huron Police Department of not doing its job and being biased against him, the sentencing court did

interrupt him and told Hofmann that his guilt was not at issue. When Hofmann again tried to talk about the police's manipulation of the victim, the court stated it had heard from Hofmann and was ready to impose the sentence. We conclude that the sentencing court did not err when it terminated Hofmann's allocution. Hofmann's accusations concerning the police were irrelevant to the appropriate sentence to be imposed. He had the opportunity to allocute." *Hofmann* at ¶34.

{¶20} Like *Hofmann*, appellant was given his right to allocution. In mitigation, appellant claimed that the trial court erred by failing to sever the case, that he was not guilty of the charges, and provided his reasons in support. However, appellant's allocution turned to matters unrelated to mitigation. A trial court may limit a defendant's allocution if it concerns extraneous matters unrelated to the sentence and is not about mitigation. *Hofmann* at ¶33. As Judge Brogan stated in *State v. Smith*, "the right of allocution does not provide an accused with the opportunity to vent his spleen with some superfluous diatribe." *Smith*, 1995 WL 655943 at *3.

{¶21} Appellant's first assignment of error is overruled.

{¶22} Assignment of Error No.2:

{¶23} "THE TRIAL COURT ERRED IN ITS SENTENCING OF THE APPELLANT TO MULTIPLE, CONSECUTIVE, AND MORE-THAN-MINIMUM SENTENCES."

{¶24} In his second assignment of error, appellant argues the trial court erred by imposing multiple, consecutive, and more-than-minimum sentences. In support of his argument, appellant presents multiple issues for this court's consideration.

{¶25} Appellant argues that, at the time the offenses were committed, appellant was entitled to minimum and concurrent sentences and the retroactive application of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, is a violation of the prohibition against ex post facto law. Appellant also argues that the 23-year sentence is unreasonable, arbitrary, and disproportionate for a "paper thief" to receive a longer sentence than an individual that commits a violent crime. Further, appellant argues that his sentence violates the rule of lenity.

{¶26} This court has previously considered each of these arguments and found them to be without merit. *See State v. Cockrell*, Fayette App. No. CA2006-05-020, 2007-Ohio-1372; *State v. Kincer*, Clermont App. No. CA2006-08-055, 2007-Ohio-3352; *State v. Pesta*,

Clinton App. No. CA2006-02-004, 2007-Ohio-2295; and *State v. Sheets*, Clermont App. No. CA2006-04-032, 2007-Ohio-1799.

{¶27} Finally, appellant claims the imposition of a 23-year prison sentence, as well as fines of $216,500.00 and restitution of $868,381.68, is also unreasonable. However, appellant presents no reasoning or factual analysis to support his argument. See *State v. Watson* (1998), 126 Ohio App.3d 316.

{¶28} Appellant's second assignment of error is overruled.

{¶29} Judgment affirmed.

BRESSLER, P.J. and WALSH, J., concur.

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IN THE TWELFTH DISTRICT
COURT OF APPEALS
BUTLER COUNTY, OHIO

STATE OF Ohio CASE NO. CA-2007-02-039
Plaintiff/Appellee,

-vs- Trial Court No. CR-02-10-1658

CHAD COPELAND,
Defendant/Appellant.

APPEAL FROM COURT OF COMMON PLEAS FOR BUTLER COUNTY, OHIO

BRIEF OF APPELLANT CHAD COPLEAND

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State v. Merriweather (1980), 64 Ohio St.2d 57 19

State v. Smith (1989), 42 Ohio St.3d 60 19

State v. West (1993), 66 Ohio St.3d 508, 513, 1993-Ohio-201 19

Const., Statutes, Rules, etc.:

R.C. §2929.14 19

R.C §2929014(E)(4) 19

R.C. §2929.41 19

Fifth Issue Presented for Review: The trial court erred in imposing financial sanctions on a prison inmate with a 23-year sentence ... 19

Appellant is entitled to a new sentencing, and a new sentencing on all counts.

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN ITS SENTENCING OF THE APPELLANT TO MULTIPLE, CONSECUTIVE, AND MORE-THAN-MINIMUM SENTENCES.

First Issue Presented for Review: A prison sentence for a first-time felony of more than the minimum sentence, consecutive sentences, and a total of 23 years in prison, for one securities transaction and passing bad checks, is an abuse of discretion and is contrary to law.

The Trial Court also erred in sentencing the Appellant to 23 years in prison. Amended Judgment, Jan. 24, 2007, T.d. 320. This Appellant had never been in prison before (T.p. 11/20103 p. 36), and therefore, according to the law in effect when the offenses were committed, he was entitled to the minimum sentence allowed by law. R.C. §2929.14(B). As a result of those requirements, "minimum sentences are favored for first-time imprisonment ...." State v. Edmonson (1999), 86 Ohio St.3d 324, 325. In fact, more than a minimum sentence in any other circumstance was a sentence "contrary to law," State v. Maynard (1999), 132 Ohio App.3d 820; State v.

Sheppard (1997), 124 Ohio App.3d 66, 67-68; and therefore appealable as of right. R.C. §2953.08(A)(4). Further, according to the law in effect when these offenses were committed, prison sentences "shall" be served concurrently to each other, unless consecutive sentences are imposed and permitted by R.C. §2929.14(E)(4), which it is now unconstitutional to do. A sentence must "not [be] disproportionate to the seriousness of the offender's conduct *and* to the danger the offender poses to the public." R.C. §2929.14(E)(4) (emphasis added). A sentence imposed post-Foster is reviewed for an abuse of discretion. State v. Knopf, 2006-Ohio-3806 at ¶14. The Trial Court abused its discretion by imposing a 23-year incarceration for this non-violent theft offender, and reversal is accordingly required.

Appellant asks, why, in this case, 23 years in prison is not disproportionate for a series of bad checks, and a bad stock investment. See State v. Garcia (1998), 126 Ohio App.3d 485; State v. Anderson (2001), 146 Ohio App.3d 427. Although the Court makes a boilerplate statement, missing from the sentencing hearing, and the Entry, are any reasons why this sentence -- 23 years --- is necessary. See State v. Comer (2003), 99 Ohio St. 3d 463. This Court has the right and obligation to review the

legality of a such a sentence, both for procedural and substantive error. R.C. §2953.08(C); State v. Colgrove (2000), 140 Ohio App.3d 306, 314.

With the lynchpin of sentences being both necessity and proportionality, considering the sentencing principles of conservation of resources, R.C. §2929.13(A), and reasonableness, R.C. §2929.11 (B), and that a sentence in excess of ten years is unreviewable for judicial release under R.C. §2929.20, commentators on the law have noted that sentences for thefts in excess of five years are and should be "rare." See, Griffin and Katz, Ohio Felony Sentencing Law, Section 8:24, p. 801-804, 815-820 (2004 Ed.). In fact, no other reported theft or fraud case, even those with multiple prior imprisonments, could be located with an equal or greater sentence than this Appellant --and his is in excess of many other more serious, even violent offenses, and only one longer in this Appellate District --- three aggravated robberies with a gun. See Griffin and Katz, supra at Appx. A p. 561-602. A sentence of "up to 20 years" is allowed, not mandated, for repeat violent offenders, major drug offenders, and rapists of children under 13. R.C. §2929.14 (D)(2), (3). If these offenders can get *no more than* 20, is there any reasonableness, logic, proportion, or necessity, for

even the *worst* of paper thieves to get *more*? Would he have not received a lesser sentence if he walked in with a gun and took the same money? See State v. Smith (2000), 136 Ohio App.3d 343. With all respect intended, it is suggested that if this sentence is not out of some bounds of discretion, there are no such bounds.

Second Issue Presented for Review: A trial court errs in sentencing a defendant who is a first time felon, for conduct which occurred prior to the remedy fashioned in State v. Foster, more than the statutorily prescribed minimum sentence.

The constitutionality of the retroactive application of the Foster remedy was not expressly addressed by the Supreme Court at all, and simply remanded the case(s) for consideration of the Opinion. That opinion unequivocally fmds: 1) the Ohio statutory scheme -- as it existed when this Appellant committed the offenses he was convicted of -- mandated a minimum and concurrent sentence UNLESS additional fact-finding was made justifying a higher sentence; and 2) under Federal constitutional law, it was unconstitutional for a judge, rather than a jury, to make those fact-findings, or to make them by any standard less than beyond a reasonable doubt. This part of the Opinion is not in

reasonable dispute, and is what (other than the remedy fashioned) would mandate, by statute, that this Appellant receive only the minimum and concurrent sentence.

The Supreme Court though went further, and then struck the portion of the statute that mandated the minimum sentence without additional findings of fact. This was a remedy, essentially procedural. No where does the Opinion mention the constitutional implications of retroactively striking a statute, resulting in a longer penalty to a criminal defendant whose offense was committed when the more favorable statute was in effect. That is the issue still to be addressed: whether under any circumstances it could be lawful for this Appellant to be sentenced to anything more than the minimum, concurrent sentence, when the statutes in effect at the time of his offense mandated that sentence.[1]

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[1]Appellant is aware that that this Court has addressed, in whole or in part, and rejected this or similarly presented arguments. See, e.g., State v. Cockrell, No. CA2006-05-020 (Fay.App. March 26, 2007). It is respectfully submitted that until the highest court in the State, or the United States, expressly addresses the same issues, the issue is open to fair debate and argument.

It is now beyond dispute that under the jury trial guarantee of the Sixth Amendment, made applicable to the States by the Due Process Clause of the Fourteenth Amendment, and once a legislature, state or federal, has predicated the availability of a criminal penalty upon proof of a particular fact, the penalty may not be imposed unless the fact has been admitted by the defendant or found by a jury to have been proven beyond a reasonable doubt. United States v. Booker (2005), 543 U.S. 220; Blakely v. Washington (2004), 542 U.S. 296; Apprendi v. New Jersey (2000), 530 U.S. 466; State v. Foster (2006), 109 Ohio. St.3d 1, 2006-Ohio-856. See also, Cunningham v. California (2007), --- U.S. ---, 127 S.Ct. 856. Foster specifically held that sentences like this Appellant's are void, and that the proper remedy for a void sentence, including this Appellant's, is a new sentencing hearing. Foster, supra at ¶103.

When the United States Supreme Court struck down Blakely's enhanced sentence that was based on unconstitutional fact-fining, the State of Washington was not free to just eliminate its system of guidelines and retroactively apply a new discretionary scheme in order to resentence Blakely to his original term of imprisonment. The only sentence that could be rendered on remand was the sentence that the law

required at the time without consideration of the unconstitutional judicial fact-finding. Blakely, 542 U.S. at 313. The Appellant in this case had never been in prison before, and therefore, by statute, he was presumed entitled to a minimum and concurrent sentences. R.C. §2929.14(B); R.C. §2929.14(E)(4). Prior to Foster the Sixth and Fourteenth Amendments prohibited the State of Ohio from imposing any sentence other than the statutory minimum upon Appellant. Foster, supra at ¶56-67. Prior to Foster. R.C. §2929.14(B) provided that a court shall impose *the shortest prison term authorized for the offense* in the absence of additional, judicial fact-finding. According to *constitutional* law as it existed at the time of his offenses, the only lawful sentence that could have been rendered against Appellant prior to the Foster remedy was a minimum term on each count. Foster, supra at ¶56-67.

Foster held, however, that the Sixth Amendment would not require the imposition of minimum and non-consecutive sentences on remand. Foster, supra at ¶93-102. The Court held instead that the statutory presumptions that require judicial fact-finding to depart from minimum, non-maximum and non-consecutive sentences were unconstitutional rather than hold the requirement of judicial

fact-finding unconstitutional. The Court severed the statutory presumptions themselves from the statute and held that on remand judges would be free to impose *any* sentence, regardless of whether or not the penalty imposed at resentencing exceeded that which would have been compelled by Blakely. That part of the Decision does not address, and is incompatible with the controlling precedent of the United States Supreme Court. The holding of Apprendi results from the constitutionally mandated balance of power between legislature, judge and jury: the Sixth Amendment not only prohibits the legislature from removing predicate factual findings from the jury, but also forbids *the judiciary* from circumventing the limitations which the legislature has placed on the availability of criminal punishments which correspond to varying degrees of criminal culpability. Apprendi, 530 U.S. at 483-85. Any other rule would permit the States to "manipulate their way out of Winship" merely by claiming that a criminal offense is actually nothing more than a sentencing enhancement attached to a less-serious conviction. Jones v. United States (1999),526 U.S. 227, 243.

Eliminating the "statutory maximum" authorized by a plea of guilty or jury verdict for the purpose of increasing the permissible range of

punishment against an offender who was convicted prior to Foster is no different than eliminating an unconstitutional element of a criminal offense for the purpose of salvaging an otherwise invalid conviction. Just as upholding a criminal conviction through the judicial severance of an unconstitutional element violates the Constitution by retroactively criminalizing broader conduct than that which the statute had originally been prohibited, see Long v. State (Tex. Crim. App. 1996),931 S.W.2d 285,295, imposing a previously-unavailable penalty through the judicial severance of the statutory maximum authorized by a plea of guilty violates the Constitution by retroactively extending the conduct to which a penalty can attach. A court cannot retroactively eliminate the statutory directives limiting the maximum for a criminal sentence any more than it can retroactively eliminate an element of the offense of conviction.

Article II, § 28 of the Ohio Constitution and Article I, § 10 of the United States Constitution prohibit the enactment of any *ex post facto* law. The ban on *ex post facto* laws means "that a law shall not be passed concerning, and after the fact, a thing done, or action committed." Calder v. Bull, 3 U.S. 386, 390, 1 L.Ed. 648, 650. The *ex post facto* clause

prohibits the Ohio General Assembly from retroactively increasing the penalty for a crime that has already been committed. Stogner v. California (2003), 539 U.S. 607, 612. If the Ohio General Assembly had passed a law repealing the statutory maximums (minimum sentences for first-time felons) which were held unconstitutional and severed in Foster, the *ex post facto* Clause would have prohibited the application of any increased penalty upon this Appellant. Id. The *ex post facto* clause clearly does not permit a patently unlawful penalty to be imposed merely because the *increased* statutory maximum resulted from *judicial* severance instead of *legislative* action. Although the *ex post facto* clause "does not of its own force apply to the Judicial Branch of government," the United States Supreme Court has recognized "that limitations on *ex post facto* judicial decision making are inherent in the notion of due process." Rogers v. Tennessee (2001), 532 U.S. 451, 456. Retroactive judicial severance of a statute places the accused in exactly the same circumstances that he would be in if the legislature enacted an unlawful *ex post facto* law. See State v. Waddell (N.C. 1973), 194 S.E.2d 19, 29-30, *abrogated on other grounds*, Woodson v. North Carolina (1976), 428 U.S. 280; see also State v. Watkins (N.C. 1973), 196 S.E.2d 750,

755. Because a judicial severance changes the actual terms of the statute, the *ex post facto* clause applies.

The United States Supreme Court has been extremely vigilant in searching the record for any increase in a defendant's sentence and quick to strike down those increases. In In re Medley (1890), 134 U.S. 160, the Court examined a statute that was not in effect at the time of the offense and mandated that the petitioner had to be held in solitary confinement while awaiting execution. The prior statute had no such provision and therefore "was an additional punishment of the most important and painful character and is therefore forbidden by this provision [Ex. Post Facto Clause] of the Constitution of the United States". Id. at 171. In Lindsey v. Washington (1937),301 U.S. 397, the Court addressed a change in the State of Washington's sentencing provisions from the law in effect at the time of the offense, which provided that the trial court could impose a sentence up to a maximum of fifteen years, to at the time of sentencing which required a sentence of fifteen years in every case, but with parole discretion to determine whether a shorter sentence was appropriate. The Court prohibited the application of the new law to that petitioner, holding that the *ex post facto* clause looks to the *standard of punishment* prescribed by the

statute rather than the sentence actually imposed. Lindsey, 301 U.S. at 401. In Miller v. Florida (1987), 482 U.S. 423 the Court struck down state sentencing guidelines because they violated the *ex post facto* clause, because at the time the defendant committed the crime sentencing guidelines resulted in a presumptive sentence of 3 1/2 to 4 1/2 years of imprisonment, and the sentencing judge had discretion to sentence an offender anywhere within the presumptive range without the requirement of a written explanation, but a departure outside of the range required clear and convincing reasons in writing for doing so; but by sentencing the presumptive sentence was higher. The United States Supreme Court unanimously reversed. It was immaterial that the defendant could not definitively show he would have got a lesser sentence under the old guidelines because petitioner has been "substantially disadvantaged" by the retroactive application of revised guidelines, which allowed the judge to impose a higher sentence than previously contemplated. Id. at 431-33. As the Court stated:

> To impose a 7-year sentence under the old guidelines, the sentencing judge would have to depart from the presumptive sentence range of 3 1/2 to

> 4 1/2 years. As a result, the sentencing judge would have to provide clear and convincing reasons in writing for the departure, on facts proved beyond a reasonable doubt, and his determination would be reviewable on appeal. By contrast, because a 7-year sentence is within the presumptive range under the revised law, the trial judge did not have to provide any reasons, convincing or otherwise, for imposing the sentence, and his decision was unreviewable. Thus, even if the revised guidelines law did not "technically...increase... the punishment annexed to {petitioner's] crime," Lindsey, supra at 401, it foreclosed his ability to challenge the imposition of a sentence longer than his presumptive sentence under the old law. Petitioner therefore was "substantially disadvantaged" by the retrospective application of the revised guidelines to his crime.
>
> Miller, supra at 432-433.

The Supreme Court in Carmell v. Texas, 529 U.S. 513 (2000), authored by Justice Thomas, reaffirmed that a state's retroactive modification of its laws regarding evidence -- in this case the evidence necessary to impose more than a minimum

sentence -- could constitute a viable *ex post facto* challenge:

> All of these legislative changes, in a sense, are mere images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.

Id. at 533. Similarly, once the United States Supreme Court (and the Ohio Supreme Court, for that matter) determined that it is unconstitutional to impose more than the minimum sentence on a criminal defendant because of the availability of a higher sentence only after additional fact finding, it is also unconstitutional to retroactively apply the striking of the statutory presumptions that mandate that minimum sentence.

Judicial severance that expands the available range of punishment falls outside the proscriptions of the *ex post facto* clause and in addition exceeds the

limits on retroactive judicial decisions under the Fourteenth Amendment. As recognized in Bouie v. City of Columbia, (1964), 378 U.S. 347, 353, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, 10, of the Constitution forbids." Given the similar impact of judicial decision-making and legislation on the rights of criminal defendants, the fundamental principle that "the required criminal law must have existed when the conduct in issue occurred" must be applied to restrict the retroactive application of both. Id. at 354. In short, the Court explained: "If a state legislature is barred by the *Ex post facto* Clause from passing [a retroactive law], it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Id. at 353. The Supreme Court emphasized that the petitioners lacked fair warning of the new interpretation afforded the statute as it was "clearly at variance with the statutory language" and it did not have "the slightest support in prior South Carolina decisions." Id. at 356. Subsequent courts have held that the due process clause likewise proscribes judicially-enforced changes in interpretations of the law that unforeseeably expand

the punishment accompanying a conviction beyond that which an actor could have anticipated at the time of committing a criminal act. Devine v. New Mexico Dept of Corrections (C.A. 10 1989),866 F.2d 339, 344-45.

Retroactive application of Foster seriously and unexpectedly disadvantages criminal defendants. First and foremost, they are divested of the presumption of minimum, less than maximum and concurrent terms of imprisonment when facing their sentencing judges at the trial court -- after already pleading or going to trial on that expectation. Second, they lose the meaningful appellate rights that existed prior to Foster for review of non-minimum or consecutive sentences. Before the Foster remedy, a defendant enjoyed a presumptive sentence within the range specified for his offense, and, if he received a sentence greater than the presumption, he could be assured a new sentencing hearing if the trial court failed to make the necessary findings, made erroneous findings or failed to provide reasons for those findings made in support of maximum or consecutive terms. See State v. Mathis (2006), 2006-Ohio-855, ¶¶ 34, 37: "Pre-Foster, R.C. §2953.08(G)(1) provided an opportunity for remand to the trial court if required findings were missing." If

the Foster remedy is retroactively applied to resentencings, these important rights, will unexpectedly be lost. For the reasons expressed in Miller, the *ex post facto* clause would prohibit the Ohio General Assembly from eliminating the statutory presumptions in Ohio's felony sentencing law and applying that change retroactively. As in Miller, Ohio defendants had the expectation of presumptive sentences that could only be overcome by judicial findings, and of appellate rights that would ensure that any enhanced sentence rested squarely on a permissible basis. The elimination of any presumptive sentence and the corresponding diminished ability to challenge on appeal a departure from that presumptive sentence substantially disadvantages criminal defendants.

In the instant case, the remedy accomplishes by judicial fiat that which the Ohio General Assembly is precluded from doing by the *ex post facto* clause. As explained in Bouie, the Due Process Clause does not countenance such a result. For defendants whose criminal conduct pre-dates February 27, 2006, the severance remedy is unavailable as a matter of constitutional law. The decision to abolish sentencing presumptions for criminal defendants constitutes a marked and

unpredictable departure from the law passed by the General Assembly. See, Foster, at ¶ 87 (explaining that "[t]he General Assembly undoubtedly never anticipated that the judicial-finding requirements contained within S.B.2 would be held unconstitutional"). How could a criminal defendant anticipate such a change? Given this unexpected and detrimental departure, due process precludes the retroactive application of the now-severed provisions to defendants whose offense conduct pre-dates the release of the opinion in the instant case.

As stated previously, the decision in Foster did not merely constitute judicial interpretation of the meaning of a statute; the sentencing statutes themselves were altered and enlarged through judicial severance. Even assuming that the *ex post facto* clause does not reach acts of judicial severance, the decision in Foster still violates the Fourteenth Amendment because if "a state legislature is barred by the *ex post facto* clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie, 378 U.S. at 353-54.

If the General Assembly had repealed the statutory maximums which were in place prior to the

decision in Foster -- which is essentially what Foster did -- the *ex post facto* clause would have prohibited the State of Ohio from imposing the increased penalties on this Appellant, who had already committed the offense, had been convicted and was sentenced. Stogner, Calder, supra The Fourteenth Amendment accordingly prohibits a court from achieving the exact same result through an act of judicial severance. Bouie, 378 U.S. at 353-45; accord Rogers, 532 U.S. at 460-61. See also, State v. Garner (1995), 74 Ohio St.3d 49, 57, quoting Bouie v. Columbia. 378 U.S. at 353.

The post-Foster sentencing framework may not be applied to Appellant to impose more than the minimum sentence. The jury trial guarantee, the *ex post facto* clause, and the Fourteenth Amendment due process limits on retroactive judicial decisions prohibit the imposition of any penalty exceeding the statutory maximum that was in place prior to Foster. The Supreme Court struck down the Florida law that retroactively altered the presumptive sentencing range for particular offenses, even though the law allowed upward departures if the judge made specific findings -- exactly the remedy imposed by Foster -- citing "the lack of fair notice and governmental restraint when the legislature increases punishment

beyond what was prescribed when the crime was consummated." Miller, supra at 430-431, citing Weaver v. Graham (1981), 450 U.S. 24, 28-29.

For the reasons expressed in Miller the ex post factolDue Process Clauses prohibit retroactive elimination of the statutory presumptions for this Appellant. As in Miller, Appellant had the expectation of a presumptive sentence that could only be overcome by jury findings or admission, and appellate review of any enhanced sentence. The elimination of any presumptive sentence, and the ability to appeal a departure from that presumptive sentence, substantially disadvantages him. Accordingly, the Foster remedy can not be retroactively applied to this Appellant. This Court should vacate his sentence and impose the minimum sentence required by the statutes and case law in effect prior to Foster and without further remand.

Third Issue Presented for Review: The Constitutional Rule of lenity prohibits a choice among equal statutory interpretations resulting in increased penalties for a criminal defendant.

Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not the courts should

define criminal activity, United States v. Bass (1971), 404 U.S. 336 (1971), and set the punishments therefor. See, Bifulco v. United States (1980), 447 U.S.381. The rule of lenity means that the Court will not interpret a criminal statute so as to *increase* the penalty that it places on an individual when such an interpretation can be based on no more than a guess of what the legislature intended. Albernaz v. United States (1981), 450 U.S. 333. The enactment of the statutory provisions struck down in the Ohio sentencing cases strongly suggests that the General Assembly did not intend for judges to impose consecutive or maximum sentences in all cases. A presupposition of our law is to resolve doubts in enforcement of a penal code against the imposition of harsher punishment. Bell v. United States (1955), 349 U.S. 81, 83 (1955). Ohio has codified this presupposition in R.C. §2901.04(A) that "Sections of the Revised Code defining ... penalties shall be strictly construed against the state, and liberally construed in favor of the accused." See State v. Quisenberry (1994), 69 Ohio St.3d 556, 557.

The attempt to constitutionalize Ohio's sentencing statutes by excising all clauses that restrict the trial court's discretion to impose higher sentences is also contrary to the test of lenity in

interpretation. The enabling statute, R.C. § 181.24, clearly intended for the statutes enacted to provide uniformity, proportionality, "with increased penalties for offenses based upon the seriousness of the offense and the criminal history of the offender," with judicial discretion to be limited. R.C. §181.24 (B)(1)-(3). Those goals were embodied in the statutes ultimately enacted and subsequently reviewed by the Court in Foster. The expressly stated purposes and intent of Senate Bill 2 was to reserve higher sentences for the worst offenses and offenders. State v. Comer (2003), 99 Ohio St. 3d 463, 2003 Ohio 4165, at ¶21, citing State v. Boland (2002), 147 Ohio App.3d 151, 162, 2002-Ohio-1163. "Consistency and proportionality are hallmarks of the new sentencing law." Id., citing Griffin & Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan (2002), 53 Case W.Res.L.Rev. 1, 12. While higher sentences were permitted, imposition of such sentences required that "findings and reasons must be articulated by the trial court so an appellate court can conduct a meaningful review of the sentencing decision." Griffin & Katz, Ohio Felony Sentencing Law, at 458-459, Section 1.21.

The General Assembly's articulated goals are now relegated to historical and statutory notes,

replaced by a judicially enacted scheme that requires findings only when a trial court seeks to give a "downward departure" pursuant to R.C. §2929.20(H). State v. Mathis, 109 Ohio St.3d 54, 2006-Ohio-855, syl. 1. Given the Court's prior pronouncements on the laudable goals inherent in Senate Bill 2, this construction violates R.C. §2901.04(A) by imposing the least lenient construction of the statute on a defendant being resentenced.

Fourth Issue Presented for Review: The trial court did not have the authority to impose consecutive sentences after State v. Foster struck down the statute allowing consecutive sentences.

The legislature's function is to create the law. Courts may only impose a sentence upon a criminal defendant that is authorized by the sentencing statutes. State v. Smith (1989),42 Ohio St.3d 60, 61; State v. West (1993), 66 Ohio St.3d 508, 513, 1993-Ohio-201. Ohio Revised Code Section 2929.14 (E)(4) authorized a trial court to impose consecutive sentences *when certain findings were made*, and R.C. §2929.41 set forth the presumption that prison terms be served concurrently. But the Ohio Supreme Court severed R.C. §2929.14(E)(4) and R.C. §2929.41 because the judicial fact-finding requirements included in those provisions were unconstitutional.

Foster at ¶99. When the Court severed the unconstitutional provisions of R.C. §2929.14 and R.C. §2929.41, it also severed constitutional sentencing Jaw -- *i.e.*, the statutory authority to impose consecutive prison terms. The trial court did not have the authority to impose consecutive prison terms. See State v. Merriweather (1980), 64 Ohio St.2d 57; 59 (sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused).

Fifth Issue Presented for Review: The trial court erred in imposing fmancial sanctions on a prison inmate wi.th a 23-year sentence.

MORNING SESSION
TRANSCRIPT OF PROCEEDINGS
* * * * * * * * * * * * * * * * *

THE PROSECUTOR: State of Ohio versus Chad Copeland. CR 2002-10-1658. We're here today for purposes of resentencing Chad Copeland pursuant to order of the Supreme Court of Ohio.

THE COURT: This is in accordance with Foster, which is a series -- which is a case that caused a series of cases now in Ohio to be resentenced following a decision finding that parts of the Ohio Sentencing Code were unconstitutional.

MR. SCHIAVONE: That is where we are. I would at this time would reserve any and all factors relevant to Mr. Copeland's sentencing as found in the Foster case for further review, of course, depending on the sentencing. But any of the Foster arguments that would apply to Mr. Copeland I am reserving for appeal.

THE COURT: Fair enough.

MR. SCHIAVONE: The minimum sentences for first time offenders, concurrent sentencing for first time offenders, any and all other arguments that would apply to Mr. Copeland's case.

THE COURT: All right. Thank you. Are

ARTICLE I–THE CONGRESS

Section 10, Clause 1. Treaties, Letters of Marque and Reprisal; Coinage of Money; Bills of Credit; Gold and Silver as Legal Tender; Bills of Attainder; Ex Post Facto Laws; Impairment of Contracts; Title of Nobility

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility

AMENDMENT V–GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI–JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CODE ANNOTATED
CONSTITUTION OF THE UNITED STATES ANNOTATED

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of

the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 USCS § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

ORC Ann. 181.24 (2008)

§ 181.24. Recommendation of comprehensive criminal sentencing structure; projections; draft version

(B) The comprehensive criminal sentencing structure recommended by the commission shall provide for all of the following:

(1) Proportionate sentences, with increased penalties for offenses based upon the seriousness of the offense and the criminal history of the offender;

(2) Procedures for ensuring that the penalty imposed for a criminal offense upon similar offenders is uniform in all jurisdictions in the state;

(3) Retention of reasonable judicial discretion within established limits that are consistent with the goals of the overall criminal sentencing structure;

ORC Ann. 2901.04 (2008)

§ 2901.04. Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

ORC Ann. 2929.14 (2008)

§ 2929.14. Basic prison terms

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (G), (I), (J), or (L) of this section and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court im-posing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (G), (I), (J), or (L) of this section, in *section 2907.02 or 2907.05 of the Revised Code*, or in Chapter 2925. of the Revised Code, if the court imposing a sen-tence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's con-duct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (G) or (L) of this section or in Chapter 2925. of the Revised Code, the court im-posing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of

this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

(E)-(1) (a) Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pur-suant to division (D)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehi-cle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (D)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory

prison term previously or subsequently imposed upon the offender.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (D)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(f) of this section, the of-fender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates *section 2917.02, 2917.03, 2921.34, or 2921.35 of the Revised Code*, if an offender who is under detention at a detention facility commits a felony violation of *section 2923.131 [2923.13.1] of the Revised Code*, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of *section 2921.34 of the Revised Code*, any prison term imposed upon the of-fender for one of those violations shall be served by the offender consecutively to the prison term or term of imprison-ment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of *section 2911.01 of the Revised Code*, a violation of division (A) of *section 2913.02 of the Revised Code* in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of *section 2921.331 [2921.33.1] of the Revised Code*, the offender shall serve that prison term consecutively to any other prison term or

mandatory prison term previously or subsequently imposed upon the offender.

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sen-tencing, was under a sanction imposed pursuant to *section 2929.16, 2929.17, or 2929.18 of the Revised Code,* or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the of-fender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 [2929.14.2] of the Revised Code.* If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (D)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term imposed pur-suant to division (D)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to di-vision (D)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 [2929.14.2] of the Revised Code.*

(6) When consecutive prison terms are imposed pursuant to division (E)(1), (2), (3), (4), or (5) or division (J)(1) or (2) of this section, the term to be served is the aggregate of all of the terms so imposed.

ORC Ann. 2929.19 (2008)

§ 2929.19. Sentencing hearing

(B)(2) The court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:

(a) Unless the offense is a violent sex offense or designated homicide, assault, or kidnapping offense for which the court is required to impose sentence pursuant to division (G) of *section 2929.14 of the Revised Code*, if it imposes a prison term for a felony of the fourth or fifth degree or for a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of *section 2929.13 of the Revised Code* for purposes of sentencing, its reasons for imposing the prison term, based upon the overriding purposes and principles of felony sentencing set forth in *section 2929.11 of the Revised Code*, and any factors listed in divisions (B)(1)(a) to (i) of *section 2929.13 of the Revised Code* that it found to apply relative to the offender.

(b) If it does not impose a prison term for a felony of the first or second degree or for a felony drug offense that is a violation of a provision of

Chapter 2925. of the Revised Code and for which a presumption in favor of a prison term is specified as being applicable, its reasons for not imposing the prison term and for overriding the presumption, based upon the overriding purposes and principles of felony sentencing set forth in *section 2929.11 of the Revised Code*, and the basis of the findings it made under divisions (D)(1) and (2) of *section 2929.13 of the Revised Code*.

(c) If it imposes consecutive sentences under *section 2929.14 of the Revised Code*, its reasons for imposing the consecutive sentences;

(d) If the sentence is for one offense and it imposes a prison term for the offense that is the maximum prison term allowed for that offense by division (A) of *section 2929.14 of the Revised Code or section 2929.142 [2929.14.2] of the Revised Code*, its reasons for imposing the maximum prison term;

(e) If the sentence is for two or more offenses arising out of a single incident and it imposes a prison term for those offenses that is the maximum prison term allowed for the offense of the highest degree by division (A) of *section 2929.14 of the Revised Code or section 2929.142 [2929.14.2] of the Revised Code*, its reasons for imposing the maxi-mum prison term.

ORC Ann. 2929.20 (2008)

§ 2929.20. Judicial release

(H)(2) A court that grants a judicial release to an eligible offender under division (H)(1) of this section shall specify on the record both findings required in that division and also shall list all the factors described in that division that were presented at the hearing.

ORC Ann. 2929.41 (2008)

§ 2929.41. Multiple sentences

(A) Except as provided in division (B) of this section, division (E) of section 2929.14, or division (D) or (E) of *section 2971.03 of the Revised Code*, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. Except as provided in division (B) (3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal cor-rectional institution.

ORC Ann. 2953.08 (2008)

§ 2953.08. Grounds for appeal by defendant or prosecutor of sentence for felony; appeal cost oversight committee

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(4) The sentence is contrary to law.

(G) (1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (H) of *section 2929.20 of the Revised Code* relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.